

S.A.S. v France: The French Burqa Ban and Religious Freedom

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LUCY VICKERS, SEP 10 2014

On 1st July, the European Court of Human Rights made its most recent ruling regarding religious symbols in its decision in the case of France's ban on face coverings, known as the 'burqa-ban'. The Court held that this ban does not breach the right to freedom of religion as protected by Article 9 of the European Convention on Human Rights.

The French burqa-ban makes it a criminal offence to wear clothing designed to conceal the face in public. Although the French law banning face coverings was not limited to the burqa, the background to the provision makes very clear that the full-face veil worn by some Muslim women was its main target. It followed an extensive debate in France over the wearing of headscarves and other religious symbols in public employment and schools (see paras 15-27 of the judgment). Although the secular nature of the public service, including schools, is well established in France, the ban on face coverings altogether in public is certainly controversial. The ban covers all public areas and so can criminalise women going about their day-to-day business: shopping, taking children to school, or going to the doctor. Unlike some restrictions on religious symbols, then, the ban was extremely far-reaching, and likely to be breached repeatedly by those who choose to wear the veil. There is also no potential for opting out: even if the veil wearer is going somewhere where the veil is allowed, she is unlikely to be able to get there without entering the public space.

The issue of religious freedom as regards religious dress had been before the European Court of Human Rights (ECHR) before. In previous cases, the ECHR has concluded in favour of allowing some restriction on religious dress, for example for teachers (*Dahlab v Switzerland Applic. No. 42393/98* Decision of 15 Feb 01) and students (*Sahin and Karaduman v Turkey Applic. No. 16278/90*), although the restrictions have been disallowed when they have been applied disproportionately. (*Eweida et al v UK Applications Nos. 48420/10, 59842/10, 51671/10 and 36516/10* Judgment 15 January 2013)

These cases involved bans of limited scope, applying in schools and workplaces. The most far-reaching ban on the wearing of religious symbols to have been considered by the ECHR prior to the *S.A.S. v France* case was *Ahmet Arslan (Ahmet Arslan and Others No. 41135/98, 23 Feb 2010)*, a case which, like that in *S.A.S. v France*, involved a ban on the wearing of religious clothing in public places. The ECHR held in *Arslan* that the ban was unnecessary, as it applied too widely: it applied to all public spaces, and to all those who wore the clothing (in contrast to more limited restrictions in other cases, such as restrictions on public servants or in limited spheres, such as schools).

In the light of the *Arslan* decision, one might have assumed that the Court would find that the French ban was unduly restrictive of religious freedom, in particular because of its very broad scope. However, despite setting out strong reasons to overturn the ban, it was eventually upheld by the Court.

The judgment of the ECHR contains a very strong case against the ban on face coverings. First, the Court pointed out that a ban on the face veil in public would breach human rights standards and would be alien to European values, according to most norms set out in international law and practice. Second, the Court reviewed the situation in other European states and found that no other country allows such broad-based bans on the face veil. Although a ban was also introduced in Belgium, no other state has allowed such a sweeping ban to be upheld. When a district in Spain

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introduced a similar scheme, it was found to be disproportionate by a higher court (Brems, 2014a).

Third, the court considered the legitimate aims that have been used previously to justify bans on religious symbols, and concluded that the ban is unnecessary to achieve most of them. For example, it found that the aim of public safety did not require a ban on the veil in all public spaces. Although security sometimes does require that an individual identify herself, this does not mean the face must be visible at all times in the street. Moreover, the Court also held that the ban was not necessary to uphold gender equality. This finding is interesting, as the issue of gender equality has also been raised in other cases regarding restriction on the veils and headscarves worn by Muslim women. In the earlier case of *Sahin*, the Court had confirmed its earlier position that the Islamic headscarf could not easily be reconciled with principles of gender equality. It was left to the dissenting opinion of Judge Tulkens to argue that it was inappropriate for the Court to determine the meaning of the religious practice for others, and to question how the principle of gender equality could be used to prevent a woman from freely adopting a religious practice. In *S.A.S. v France*, this previously dissenting opinion of the Court was effectively adopted, with the majority taking the view that gender equality cannot be used as a reason to limit women's freedom.

The Court's rejection of the public safety and gender equality grounds is important, as these reasons have often been used to justify restrictions on face coverings (Brems, 2014a) and the case is still made by many, such as Frances Raday, that banning the veil can be necessary to protect women's interests. Indeed, Raday (Raday 2014) has criticised the ECHR for its rejection of this position. Moreover, the Court also rejected the notion that a ban was necessary for human dignity. The Court noted, to the contrary, that the practice is an expression of cultural identity which contributes to the pluralism that is inherent in democracy, and that there was no evidence that women who wear the veil intend to offend the dignity of others. Indeed, the number of women who wear the veil is very small, and criminalisation in itself is serious and may ingrain negative stereotypes.

Having set out so fully why it was not going to rely on some of the standard reasons for upholding restrictions on religious dress, the Court then identified a new reason for upholding the ban: the legitimate aim of 'respect for the minimum requirements of life in society' referred to as 'living together'. This aim is certainly controversial. It is not one of the enumerated grounds in the Convention and must surely be one of the weakest of legitimate aims identified by the Court in its case law. Not only did the dissenting judges call it 'far-fetched' and 'vague', but even the majority accepted that it was a 'flexible' notion which needed careful examination to ensure its necessity.

However, despite recognising the weakness of this aim, the court accepted not only that it was legitimate, but also that, given the wide margin of appreciation applicable in religious freedom cases, the ban was proportionate.

One reason for reaching a different conclusion from that in *Arslan* was that the particular religious dress in question involved covering the face, whereas in *Arslan*, the face remained visible. The covering of the face was the focus of concern for the Court and is the basis for the finding that such coverings offend against the legitimate aim of 'living together'. The main concern of the Court seems to be ensuring that social cohesion is maintained, by prohibiting a practice which has the effect of reducing social interaction.

The recognition of an aim of 'living together' as one of the 'rights and freedoms of others' protected by the Convention does give rise to some concerns. Ostensibly, the concern of the Court was with the problem of lack of social interaction when the face is covered (para 141). However, the ease with which the dissenting judges identified counter examples where face coverings are allowed ("examples that are perfectly rooted in European culture, such as the activities of skiing and motorcycling with full-face helmets and the wearing of costumes in carnivals" at para 9 of the dissent, to which one might add the increasingly common 'allergy/pollution masks' frequently worn in the street) suggests that the basis of the distinction is less on lack of social interaction, and more on the fact that many people find the covering of the face alienating. This is undoubtedly the case; the unease of many members of the public with the practice of veiling is well documented in the media. It seems plausible that the decision of the Court to allow the criminalisation of the face veil on the grounds of promoting 'living together' could mean that any minority practice that makes the majority feel uncomfortable may now be challenged (Brems 2014b, Howard 2014).

One explanation of the Court's approach can be seen in its acknowledgement of a need to exercise restraint in

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reviewing policies which have been agreed through democratic processes. Whilst it is understandable that the Court will be wary of over-turning the democratically agreed legislation, this surely should not be too weighty a concern. After all, a huge number of cases before the court involve review of democratically agreed legislation; if the court's supervisory role on human rights standards is to mean anything, it must surely be able to challenge democratically agreed laws. Moreover, in this particular case, the reasoning that led to the democratically agreed ban on face coverings was precisely the reasoning that the court rejected. The court is thus somewhat inconsistent. Although the court itself rejects justifications for the veil ban based on security, dignity, and gender equality itself, it then allows exactly those same arguments 'in the back door' by giving weight to the democratic mandate which itself is based on those very same justifications.

The overall conclusion of the Court in the *S.A.S.* case is disappointing. The judgment feels internally inconsistent. On the one hand, it contains strong and detailed reasoning on the issues of gender and dignity, issues which have traditionally been subject to significant academic and policy debate. On the other hand, it gives significant leeway to states to legislate to uphold the very nebulous concept of 'living together', an aim which could equally be met by promoting a 'live and let live' attitude. By way of contrast, it is interesting to note the approach to increasing social cohesion taken in the UK, where a duty is imposed on all public sector authorities in the exercise of their functions to have due regard to the need to eliminate discrimination and to foster good relations between people of different religions and beliefs (s149 Equality Act 2010). This approach is surely preferable, as it seeks to promote social cohesion whilst at the same time avoiding less favourable treatment of minorities.

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